

Pan Pacific Television, Inc.
Television Station KPST-TV, Vallejo, California

Fouce Amusement Enterprises, Inc.
Television Station KRCA-TV, Riverside, California

The HSN home shopping format enabled such minority-owned stations to begin or continue operations.^{23/} Forcing such stations to adopt a new, more conventional format would almost certainly cause their failure. As Congressman Ed Towns stated in a letter of April 6, 1992, to Congressman Carlos Moorhead:

I would urge you to oppose any restrictive amendment which would deny HSN stations carriage because of the dire consequences it would have for minority-owned stations.

Similarly, Parren J. Mitchell, Chairman of the Minority Business Enterprise Legal Defense and Education Fund, Inc., stated in a letter of July 17, 1992, to Chairman John D. Dingell of the House Committee on Energy and Commerce:

Congressman Ritter's provision [denying mandatory must-carry to home shopping stations] will deny 1/3 of the Black owned television stations the 'must-carry' status afforded all other full power TV stations simply because of their affiliation with HSN. These Black station owners are accused of not providing their communities with public interest and public affairs programming. I have been advised by several of the Black owners of HSN affiliated stations that the charges against them

^{23/} As Carmen Ponce-Nicasio Briggs, President and owner of Ponce-Nicasio Broadcasting, Inc. stated to the Senate, "The FCC gave us 'life', but HSN programming gave us the 'bread' to meet our daily operating expenses allowing us to retain ownership....[HSN programming] was our economic salvation."

and HSN are utterly false and am writing to you to clarify the record.

This theme was repeated in another letter to Chairman Dingell, this one dated July 20, 1992, from Sharon McPhail, President of the National Bar Association:

These minority broadcasters provide their communities with programs that are produced locally and programs that address issues of interest to their minority audience: they are providing vital training and employment

station's programming service to its community,^{25/} the focus of the inquiry here should be on stations' public service programming, not their entertainment programming.

Stations' home shopping programming is the

the bulk of entertainment on contemporary television.^{26/}

The home shopping format is admittedly non-traditional but as demonstrated herein, it is precisely what the Commission contemplated when deregulating stations' commercial practices.^{27/} The Commission's 1984 Television Deregulation decision removed prior restrictions on the amount of commercial matter which television stations could provide and invited institution of innovative commercial practices. The court approved this action. And HSN accepted the Commission's invitation, instituting an unprecedented home shopping format. No television station had aired such programming before HSN's stations did so.

Indeed, HSN's entertainment format introduced the first practical application of interactive television. Never before had a broadcaster sought to use the airwaves to facilitate continuing interaction between viewers and the

^{26/} Members of the Commission have repeatedly criticized the violent and sexually-oriented content of conventional contemporary television. See, e.g., Notice of Proposed Rulemaking, GC Docket No. 92-223, 7 FCC Rcd 6464, 6468 (1992) (Separate Statement of Commissioner Duggan); Chairman James H. Quello, Speech before the NATPE/INTV Convention (Jan. 24, 1993) ["Broadcasters and Program Producers must also become more aware that there is a growing public outcry against smut, excessive sex and violence on TV..."]. The HSN home shopping programming is neither obscene nor violent.

^{27/} See Television Deregulation, 98 FCC 2d at 1105. The Commission itself has stated: "We view this relatively new 'format' as an example of license[e] experimentation and regulatory flexibility." Family Media, Inc., 2 FCC Rcd 2540, 2542 (1987).

programmer. This pioneering effort could well be the forerunner of additional interactive over-the-air television services.

HSN took the risk that the marketplace would accept its programming, and this has proven to be the case: information submitted by SKC indicates that Home Shopping Club membership within each SKC station's market ranges from 7% to over 15% of television households, and since HSN has many more viewers than purchasers, it is clear that there is a substantial audience for HSN programming. The Commission should not now effectively reverse its decisions to rely on marketplace forces to control entertainment format and programming selection by arbitrarily penalizing one type of entertainment format.^{28/}

Home shopping programming is innovative entertainment, which has been affirmatively encouraged by the Commission. The fact that it is different does not, however, mean that stations which have such a format cannot operate consistent with the public interest. A home shopping entertainment format is not inherently incompatible with fulfillment of public interest obligations. Indeed, on several occasions, the Commission has specifically reviewed both the entertainment and non-entertainment formats of home

^{28/} See Television Deregulation, 98 FCC 2d at 1104; FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

shopping stations and has concluded that they are fully consistent with the public interest, convenience and necessity. These Commission judgments have been affirmed by the courts and must be respected here.

Television Deregulation. The Commission's Television Deregulation decision eliminated its former programming guidelines^{29/} as well as the limits it had imposed on the amount of commercial matter which television stations could air.^{30/} The Commission concluded that marketplace forces would be more effective than restrictive regulation in furthering the public interest, deciding that with respect to programming, "...licensees should be given [the] flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand;" while with

request to comment on the Commission's decision.

Amendment."^{31/} The Commission thus removed its restrictions on licensees' programming and commercial operations, retaining, however, the fundamental obligation that licensees "provide programming that is responsive to the issues confronting its community."^{32/} Although seriously challenged by citizens' groups, the Commission's deregulation of commercial television was sustained by the court.^{33/}

A home shopping format is completely consistent with the Commission's deregulation decision. In Television Deregulation, the Commission noted that "[a] significant danger posed by our commercial guideline is that it may impede the ability of commercial television stations to present innovative and detailed commercials...[O]ur regulation may also interfere with the natural growth and development of broadcast television as it attempts to compete with future video market entrants."^{34/} The Commission thus deregulated stations' commercial policies in

31/ Television Deregulation, 98 FCC 2d at 1087-88, 1103.

32/ Id. at 1091-1092.

33/ Action for Children's Television v. FCC, 821 F.2d 741. The court also approved the Commission's similar decision deregulating radio. Office of Communication of the United Church of Christ, 707 F.2d at 1437.

34/ Television Deregulation, 98 FCC 2d at 1104.

order to "...promote licensee experimentation and otherwise increase commercial flexibility."^{35/}

HSN's entertainment is exactly the type of unique innovation which Television Deregulation contemplated. Indeed, in waiving its network rules for HSN's new type of entertainment program service, the Commission itself has explicitly recognized that fact: "HSN, with its unique programming fare, method of generating revenues, and operational approach, would appear to be the kind of innovative enterprises the Commission is encouraging..."^{36/}

The Commission is charged with defining and implementing the public interest,^{37/} and its Television Deregulation decision exercised that authority in determining that formats which involve presentation of commercial content do not conflict with the public interest. (Indeed, all television programming is ultimately commercial in nature: conventional advertiser-supported television

^{35/} Id. at 1105. That Television Deregulation has achieved its goal of assisting commercial television's development is evidenced by the fact that as of September 30, 1984, there were 893 operating commercial television stations (Broadcast Station Totals for September 1984 [October 12, 1984]), while as of January 31, 1993, there were 1146 such stations (Broadcast Station Totals as of January 31, 1993 [February 11, 1993]).

^{36/} Home Shopping, Inc., 4 FCC Rcd 2422, 2423 (1989) [citation omitted].

^{37/} See, e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); FCC v. WNCN Listeners Guild, 450 U.S. 582.

stations also sell products, except that stations sell to an advertiser who then sells to viewers; HSN simply eliminates the middle step of selling directly to advertisers.) This decision was affirmed as consistent with the public interest, and it thus necessarily follows that operations sanctioned by deregulation are also consistent with the public interest.

More particularly, the HSN home shopping entertainment format was encouraged by and is consistent with the Commission's judicially-approved deregulation decision. Indeed, the Commission and the courts have both reviewed the operations of stations with such formats and concluded that this is so.

Prior Public Interest Findings. Petitions to deny applications for consent to HSN's acquisition of Television Stations WHSW-TV (then WJKL) and WQHS-TV (then WCLQ) challenged, among other matters, their proposed home shopping entertainment format. After reviewing a complete record, including the results of a petitioner's monitoring of WSHS-TV's actual programming as well as the applicants' statements concerning their programming proposals, the Commission's Mass Media Bureau denied the petition.^{38/}

^{38/} Letter to David Dasef, Esq., MM Bur. (November 6, 1986).

An application for full Commission review of that action was filed which again challenged the proposed HSN entertainment and non-entertainment programming. The Commission affirmed the staff's decision, concluding that home shopping entertainment programming is "consistent with the public interest;" that it had not been "...shown how Silver King's [an HSN subsidiary] approach [to non-entertainment programming]...is not addressing the issues identified in the stations' programs/issues lists;" and that the stations involved "...have presented programming responsive to issues of concern in those communities."^{39/}

The Commission's decision was then challenged in court, and was affirmed by the United States Court of Appeals for the District of Columbia Circuit.^{40/}

The general HSN programming format was also challenged in connection with the purchase of Television Station WHSP-TV, Vineland, New Jersey, by another HSN subsidiary. In that case, as well, the Commission reviewed a comprehensive record which included detailed information concerning the station's non-entertainment programming (as well as its shop-at-home entertainment format) and concluded that such programming was consistent with the public

^{39/} Family Media, Inc., 2 FCC Rcd at 2542-43.

^{40/} Office of Communication of the United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990) ["UCC"].

interest.^{41/} The court in UCC also affirmed that Commission determination.

The Commission once more thoroughly considered and approved the general entertainment and non-entertainment programming of the then HSN-owned stations in rejecting a petition to deny the 1989 license renewal applications of Television Stations WHSP-TV and WHSE-TV. It also reviewed a complete record concerning the stations' programming and concluded that "...petitioners have failed to make a prima facie case regarding the licensees' issue responsive programming obligations..." and, more particularly, that "...there are no substantial and material questions regarding the licensees' issue responsive programming."^{42/}

Finally, each of the then HSN-owned stations has filed a license renewal application and each of those applications has been granted, reflecting additional, repeated Commission determinations that those stations are operating in a manner consistent with the public interest, convenience and necessity. Given this record of repeated grants of license renewal applications, it is clear that the Commission can and should make the determination that home

41/ Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324 (1986), recon. denied, Press Broadcasting Co., 3 FCC Rcd 6640 (1988), aff'd, UCC, 911 F.2d at 812.

42/ Silver King Broadcasting of Vineland, Inc., 5 FCC Rcd 7499, 7500-01 (1990).

shopping stations as a class are no different from other conventionally-formatted stations with respect to determinations about service in the public interest: they should be presumed to be serving the public interest unless there is an affirmative showing that their non-entertainment -- non-home shopping -- programming fails to satisfy the public interest.

In sum, the Commission and the courts have repeatedly found that the stations having a home shopping entertainment format are serving the public interest. They have specifically reviewed stations' home shopping entertainment format and their public service programming and have concluded that both are consistent with the public interest.^{43/} The continuing validity of these past determinations is confirmed by the facts set forth herein

necessity. Preliminarily, it should be noted that the Commission has never held that the popularity of particular programming is proportional to its public service value. To the contrary, the Commission has consistently refused to make value judgments concerning the public interest merits of particular program content, and, moreover, has refused to attach public interest significance to the relative popularity or "good" nature of particular programs.^{44/}

Indeed, the Notice recognizes that "[w]e have never before used a station's ratings as a factor to determine whether the licensee has met its public interest obligations." Notice, 8 FCC Rcd at 661. Conventional ratings do not and cannot accurately measure a program's audience, much less its public interest "value."^{45/} The industry thus has recognized the lack of ratings' importance as a measure of programs' merit or popularity.^{46/} Ratings

^{44/} See, e.g., WGBH Educ. Found., 69 FCC 2d 1250 (1978); Television Wisconsin, Inc., 58 FCC 2d 1232 (1975), recon. denied, 59 FCC 2d 1236 (1976).

^{45/} Television's history is replete with examples of programs or series which enjoyed much critical acclaim but low ratings.

^{46/} This is particularly the case with respect to home shopping programming, where the number of purchasers (roughly measured by Home Shopping Club membership) provides a better measure of popularity. Indeed, Barry Diller, former chairman of Fox, Inc., characterizes the number of purchasers as "...the ultimate Nielsen rating." "Barry Diller's Search for the Future," The New Yorker, Feb. 22, 1993, at 49, 60.

thus should not be used to measure stations' audiences for purposes of this proceeding. Instead, the Commission should acknowledge the fact of the home shopping format's existence and growth as evidence of the substantial audience which home shopping stations enjoy.

The Commission recognized in Television Deregulation that the marketplace acts to regulate the survival of popular, accepted formats and the demise of formats which do not attract large audiences. The home shopping format has established itself as a viable popular format, clearly evidenced by its growth over the last seven years. HSN is carried on a full- or part-time basis by approximately 35 television stations (including the 12 stations formerly owned by HSN), and different HSN network programming is carried on a full- or part-time basis by approximately 70 other television stations. Additionally, approximately 43 low power television stations carry HSN programming.^{47/} There are thus over 100 affiliated stations which carry HSN's home shopping programming, clear evidence of a strong nationwide demand for, and significant viewing of, such programming.

In short, there is clearly a widespread popular

consumers who are handicapped or shut-in and cannot readily go to stores to do their shopping and to those who do not have time or simply do not like to shop, as well as a high degree of general public satisfaction with HSN and its products. This growth also reflects widespread viewing of home shopping stations throughout the nation.

Additionally, attachments to SKC's comments include specific information concerning Home Shopping Club membership within each SKC Station's service area, and demonstrate that such membership represents a substantial proportion of each market's television households. In particular, from 7% to 15% of the television households in the SKC Stations' markets are HSC members and thus necessarily view those stations' programs, representing a substantial number of television households which not only watch but utilize HSN's service.

HSC membership is generally a function of making a purchase. HSN's experience is that a far larger number of viewers simply watch station programming than make purchases.^{48/} Accordingly, home shopping stations' actual audience is clearly far larger than indicated by membership

^{48/} Many more viewers in effect "window shop" than make actual purchases.

figures alone.^{49/} Even if audiences are assumed to be limited to those who actually make purchases, statistics concerning HSC membership clearly represent a substantial audience, confirming operation of home shopping stations' in the public interest under one of Section 4(g)'s specific criteria. Denying this large audience of home shopping stations continued access to their local public service programming through denial of entitlement to mandatory carriage would clearly be inconsistent with the Congressionally-declared public interest in ensuring the continuation of and access to locally originated programming. 1992 Cable Act, § 2(a)(10)-(11).

In sum, any public interest determination which turns on a particular program format's popularity or ratings is suspect from both a constitutional and a policy standpoint. Assuming that these decisional objections could be overcome, however, and even assuming that program viewership is a valid indicator of operation in the public interest, home shopping stations demonstrably have

be considered to have significant audiences for purposes of Section 4(g).

There are No Competing Uses of the Broadcast Spectrum Which are Unique to Home Shopping Stations

Section 4(g) also directs the Commission to consider "the level of competing demands for the spectrum allocated to [home shopping] stations..." HSN submits that there are no competing demands which are unique to the spectrum utilized by home shopping stations. There have admittedly been proposals for other uses of frequencies assigned to some such stations, but those proposals affect all stations using the channels in question, not simply those with home shopping formats. Moreover, such proposals have been and should continue to be considered in rulemaking proceedings of general applicability. Indeed, any determination that the specific channels now allocated for home shopping stations' use should be reallocated would be a content-based regulation which is clearly inconsistent with the Constitution.

Preliminarily, it should be noted that far from reflecting competing demands for the channels in question, HSN's acquisition of what are now the SKC owned and operated stations generally represented the only proposed use of the frequency. When HSN acquired them, most of those stations were in or facing bankruptcy, had been dark for substantial periods of time or had not been constructed due to financial

difficulties. HSN's use of the stations' channels was thus not one of several competing demands for spectrum: it was the only demand for the spectrum. Absent HSN, many if not all of the channels would eventually have become dark, representing an enormous waste of spectrum resources.

License Renewal Processes. The Notice asks whether the Commission's existing license renewal processes adequately accommodate competing demands for the broadcasting spectrum. Notice, 8 FCC Rcd at 661. This is clearly the case, particularly insofar as demands for specific channels occupied by particular stations are concerned.^{50/}

As the Notice recognizes, every five years, television stations' past performance is subject not only to regulatory scrutiny, but is also open to challenge by any qualified entity which seeks to use the channel in question. The statute requires the Commission to consider competing

^{50/} It should be noted in this regard that notwithstanding HSN's (and now SKC's) success in developing and optimizing spectrum utilization, there continue to be no competing spectrum demands. Although the Commission's procedures explicitly provide for competing applications, HSN is aware of only one such application having been filed with respect to any HSN-affiliated station's license renewal application, and that application was dismissed prior to hearing. (On May 1, 1989, Arthur Liu filed a competing application with respect to the 1989 license renewal application of Television Station WHSE-TV, Newark, New Jersey, then owned by HSN [File No. BPCT-890501KI]. That application was dismissed by Order, MM Docket No. 90-642, FCC 91M-1150 [April 1, 1991]).

spectrum demands in deciding which of competing applicants is to be awarded a license. Specifically, Section 307 requires Commission licensing decisions to consider "the fair, efficient, and equitable distribution of radio service." 47 U.S.C. § 307(b). In other words, all Commission licensing decisions must, by statute, consider competing spectrum demands.

There can be no more specific indicator of a competing demand for the specific spectrum used by a particular station than a renewal overfiling. Clearly, the existing, Congressionally-mandated license renewal scheme adequately takes into account competing demands for spectrum used by particular stations. The lack of such demands is established by the lack of overfilings, and should there be competing demands for the spectrum, established renewal procedures are more than adequate to address them.

Constitutional Considerations. To the extent Section 4(g) suggests that competing spectrum demands should be considered only with respect to home shopping stations, such action would clearly be unconstitutional. Spectrum allocation has never been based upon specific program content, and for good reason: it cannot be squared with the First Amendment. Any system of television channel assignments which would displace stations from allocated spectrum based solely on program content would be a

prohibited restriction which curtails protected expression. See discussion supra at 5-6, 10-11. The Commission cannot decide that there are competing demands for particular television channels simply because of the content of programming presented over those channels.

Use of Rulemaking. To the extent the Commission decides to consider competing uses for channels used by home shopping stations, the Constitution thus clearly requires that any such consideration must affect all stations using those particular channels without reference to their programming. And, HSN submits, such consideration must come in a rulemaking of general applicability.^{51/}

There are already two pending proceedings which propose reallocation of the broadcast spectrum for non-broadcast services. The Commission's Advanced Television proceeding proposes a major shift of UHF frequencies to allow for conversion to ATV,^{52/} and the Commission still has before it a 1985 proposal for further sharing of the UHF

^{51/} Should the Commission decide to reallocate spectrum occupied only by stations having home shopping formats, serious Ashbacker concerns would be raised, as the stations would have to have a forum in which to defend their past and proposed use of broadcast spectrum.

^{52/} See Second Further Notice of Proposed Rulemaking, MM Docket No. 87-268, 7 FCC Rcd 5377 (1992).

band with land mobile services.^{53/} Any decision in those proceedings would of necessity affect other stations which also use frequencies assigned to home shopping stations, and those proceedings afford the proper vehicle for reallocation. By contrast, a content-based determination herein does not.

Home Shopping Broadcast Stations Provide Competition to Cable Home Shopping Services

The final mandatory consideration herein is the "role of such [home shopping] stations in providing competition to nonbroadcast services offering similar programming." Although HSN competes with all broadcast stations and cable programming services for viewers' attention and carriage on cable systems, it clearly provides the most direct and substantial off-air home shopping alternative to cable home shopping services. Of course, the more recently developed home shopping service of ValueVision International, which owns and/or is affiliated with a number of low power television stations, innumerable infomercials, and developing network home shopping programs, offers additional off-air home shopping alternatives to viewers. Denial of a fair opportunity for cable carriage of home shopping stations would mean that viewers who desire to use

^{53/} Notice of Proposed Rulemaking, GEN Docket No. 85-172, 101 FCC 2d 852 (1985). The Commission has deferred action in this proceeding pending resolution of ATV issues.

1. The following information is being provided for your information only:

as well as on the obvious fact that cable carriage of over-the-air home shopping stations affords the most direct and substantial competition for cable home shopping services. Section 4(g)'s third mandatory consideration clearly supports must-carry entitlement for home shopping stations.

Conclusion

HSN submits that the determination in this proceeding must turn on whether stations' public service programming is complying with established standards for service in the public interest, convenience and necessity. The nature of a station's entertainment format should -- and must under the Constitution -- be irrelevant to this conclusion.

A home shopping format does not preclude service in the public interest. If home shopping stations instead carried the more conventional mix of game shows, violent drama shows, and sexually-explicit talk shows and entertainment, there would be no questions concerning the ability to comply with public service obligations. There should be no questions concerning home shopping stations' abilities either. Conclusions about public interest performance should not -- and cannot constitutionally --- be

54/ (...continued)
provide mandatory carriage of qualified local broadcast stations, as distinguished from cable program services, because only the former have local public service obligations.

altered merely because of the content of those stations' entertainment programming.

Consideration of the three factors mentioned in Section 4(g) likewise supports grant of entitlement to mandatory carriage. Home shopping stations are clearly attracting substantial audiences; they are not uniquely subject to competing spectrum demands (which should in any event be subject to rulemaking proceedings); and they offer the most direct and substantial off-air home shopping alternative.

The Commission must therefore conclude that home shopping stations are serving the public interest, convenience and necessity and therefore qualify as "local commercial television stations" for purposes of the 1992 Cable Act.

Respectfully submitted,

HOME SHOPPING NETWORK, INC.

By Celia Bachman
Celia Bachman, Esq.
General Counsel

HOME SHOPPING NETWORK, INC.
P.O. Box 9090
Clearwater, Florida 34616
(813) 572-8585

March 29, 1993

Home Shopping Network, Inc.
Exhibit No. 1

STATIONS AFFILIATED WITH HOME SHOPPING NETWORK, INC.